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No. 83-101

In the Supreme Court of the United States

October 1983 Term

Iowans for Tax Relief and Don Carver,
Appellants

vs.

The Campaign Finance Disclosure Commission and Dan Johnston,
Appellees.

On appeal from the Supreme Court of Iowa

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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TABLE OF AUTHORITIES

Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S. Ct. 612 (1976) 3

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New York Civil Liberties Union, Inc. v. Acito, 459 F. Supp. 75 (S.D. N.Y. 1978) 3

Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 101 S. Ct. 960 (1981) 4

INTRODUCTION

The Campaign Finance Disclosure Commission, having filed a Motion to Dismiss or Affirm, and Dan Johnston, Polk County Attorney, having sought and obtained an extension of time to file a response to the jurisdictional statement of Iowans for Tax Relief and Don Carver, but having not filed any response within the period of extension, Appellants Iowans for Tax Relief and Don Carver now submit this Brief in Opposition to Motion to Dismiss or Affirm.

The questions presented by this appeal fall within this Court's jurisdiction. Issue I challenges the validity of an Iowa statute as unconstitutional, which statute was upheld, 28 U.S.C. 1257(2), and the remaining issues claim rights under the United States Constitution, a basis for certiorari jurisdiction under 28 U.S.C. 1257(3), and are properly included in the jurisdictional statement under *Mishkin v. New York*, 383 U.S. 502, 512, 16 L.Ed.2d 56, 86 S. Ct. 958 (1966).

The substantiality of constitutional issues involving election law regulation are manifest. Substantiality is heightened by the thusfar successful attempt of the State of Iowa to retroactively apply an amendment to a criminal statute.

All issues were raised by Iowans in its Petition for Review of Agency Action, filed March 30, 1981, other than the issue of the retroactive application of the amendment to the definition of "political committee" contained in Iowa Code Section 56.2(6). Since the amendment was enacted subsequent to the filing of the Petition, while the Petition was pending before the district court, that issue was timely raised before the Iowa Supreme Court. The Commission attempts to imply all constitutional issues were not raised before the Iowa Supreme Court, and its incomplete excerpt of Iowans' Supreme Court Brief does not tell the full story. Iowans has requested, pursuant to Supreme Court Rule 13.1, that a certified copy of its Iowa Supreme Court Brief be transmitted to this Court. The claim the issue was not raised, Motion, pages 11-13, is untrue. That issue was raised in Iowans' initial Petition, App. p. 84, and was raised before the Iowa Supreme Court, Supreme Court Brief p. 21. The Commission's assertion, Motion, p. 13, is untrue and misleading. To support a Motion to Dismiss under Supreme Court Rule 16.1(b), the

movant must show the question was not timely or properly raised *and* not expressly passed upon. The questions were raised, and the failure of the Iowa Supreme Court to pass upon or address those issues has necessitated review by this Court.

I.

The basic issue of the constitutionality of disclosure in the context of a ballot issue has never been determined by the U.S. Supreme Court, and is not foreclosed by any prior decision.

Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S. Ct. 612 (1976) did not challenge disclosure requirements as unconstitutional per se. 424 U.S. at 60. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L.Ed.2d 707, 98 S. Ct. 1407 (1978) held the interests which justify compelled disclosure in candidate elections do not apply to referenda. Fn. 32, 435 U.S. at 792 merely provides the identity of an advertiser must be disclosed, but does not sanction or require disclosure of the contributors to the advertiser. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 70 L.Ed.2d 492, 102 S. Ct. 434 (1981) did not sanction or require disclosure of contributors to ballot issue campaigns, but struck down contribution limitations in the context of ballot issues (which limitations are constitutional as applied to candidate elections) since disclosure would be a less restrictive alternative to accomplish any legitimate governmental interest in maintaining voter confidence in the electoral process. 454 U.S. at 299.

It should also be noted Iowans has not found any reported decision, prior to the decision in this case, which failed to sustain a constitutional challenge to regulation of financing of referenda, vis a vis candidate elections. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 70 L.Ed.2d 492, 102 S. Ct. 434 (1981), *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L.Ed.2d 707, 98 S. Ct. 1407 (1978), *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978), *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), *New York Civil Liberties Union, Inc. v. Acito*, 459 F. Supp. 75 (S.D. N.Y. 1978).

II.

Iowans for Tax Relief made an uncontroverted showing that disclosure of the identities of Iowans' supporters would subject them to a reasonable probability of threats, harassment or reprisals. No evidence was offered to the contrary, and in fact no evidence of any governmental interest justifying disclosure was presented. The Commission, which has the initial burden to justify an infringement upon First Amendment rights, did not even attempt to present a showing of any need for disclosure.

Buckley v. Valeo recognized the need for "flexibility" of proof, and stated:

> New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

424 U.S. at 74.

III.

The Iowan Supreme Court cannot impose a broad construction on a penal statute in derogation of First Amendment rights, and leave the U.S. Supreme Court powerless to correct this infringement. A decision by the highest state court is not binding on this court where the state Supreme Court has evaded the federal issues, *Mullaney v. Wilbur*, 421 U.S. 684, 691, 44 L.Ed.2d 508, 95 S. Ct. 1881 (1975) such as (a) the failure to give strict construction to a penal statute in derogation of constitutional rights; and (b) the attempt to retroactively apply an amendment to a penal statute.

IV.

The "clarifying amendment", Motion, p. 11, cannot be applied to Iowans in this proceeding, which seeks to enforce a criminal statute, and will give rise to collateral estoppel effects in any subsequent criminal prosecution. You cannot retroactively apply an amendment to a penal statute, *Weaver v. Graham*, 450 U.S. 24, 28-9, 67 L.Ed.2d 17, 101 S. Ct. 960 (1981) and it is obvious you cannot clarify the criminal statute.

V.

The Commission's claim that the issue of the perpetual disclosure requirement was not properly raised is untrue, as shown by Iowans' initial Petition, and by its brief on appeal. The Iowa Supreme Court's failure to address this issue speaks to its superficial analysis of the important constitutional issues raised in this case, and its failure to appreciate the grave implications of its affirmance of an unconstitutional statute.

VI.

The Polk County Attorney sought an extension of time to file a motion to dismiss or affirm, but failed to do so. Therefore, since the interested party has not contested this issue, the Supreme Court should consider it to insure Iowans is protected, pendente lite, against any further attempt to initiate a criminal prosecution.

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